Supreme Court, U.S.
FILED

05-226 AUG 15 2005

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No. _____

In the Supreme Court of the United States

Marlene Fearing, M.A. Fearing, Inc.
and Progressive Real Estate, Inc.,
Petitioners,

v.

Mary Parr, Robert Swenson, and Arlene Swenson,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MINNESOTA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Daniel Bresnahan
Counsel of Record
310 Fourth Avenue South, #7000
Minneapolis, MN 55415-1029
(612) 338-0070

James R. Doran
416 East Hennepin
Minneapolis, MN 55414
(612) 379-5378

Attorneys for Petitioners

2005 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

QUESTIONS PRESENTED

1. Is 42 U.S.C. Section 3607 (1994), which is known as the Housing for Older Persons Exemptions ("HOP"); or is 42 U.S.C. Section 3607 as amended by the Housing for Older Persons Act of 1995 Pub L. 104-76, 109 STAT. 787 (December 28, 1995) which is known as HOPA the appropriate law to apply to the facts and circumstances of the Lake St. Croix Villas Homeowners Association for the purpose of determining whether the Association qualifies for an exemption from the Fair Housing Act?

2. If HOP is the law to be applied to the facts and circumstances of the Lake St. Croix Villas Homeowners Association, did the Association fulfill the three HOP requirements known as the:

    1. Facilities Test, and
    2. 80 Percent Test, and
    3. Publications Test

    to obtain the HOP Exemption from the Fair Housing Act?

3. If HOPA is the law to be applied to the facts and circumstances of the Lake St. Croix Villas Homeowners Association, did the Association fulfill the three HOPA requirements known as the:

    1. 80 Percent Test, and
    2. Intent Test, and
    3. Compliance Test

    to obtain the HOPA Exemption from the Fair Housing Act?

LIST OF PARTIES

The parties to Mary Parr, Robert Swenson and Arlene Swenson in their personal capacity and as members and representatives of Lake St. Croix Villas Homeowners Association, Inc. vs. Marlene Fearing et al. are Marlene Fearing, M.A. Fearing, Inc. and Progressive Real Estate, Inc. Petitioners and Mary Parr, Robert Swenson and Arlene Swenson, Respondents.

* M.A. Fearing, Inc and Progressive Real Estate, Inc. are not publicly held companies, and have no parent companies.

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STATUTES

42 U.S.C. Sections 3601-3631 (Fair Housing Act, "FHA")

42 U.S.C. Sections 3607(b)(2)(c)(i) and (iii) (1994)
(Housing for Older Persons Exemptions, HOP)

42 U.S.C. Section 3607(b)(2)(c)(ii) and (iii) as amended by the Housing for Older Persons Act of 1995, Pub. L. 104-76 109 STAT. 787 (December 28, 1995)
(HOPA)

The trial court ruled that HOPA was the law to be applied for the purpose of determining whether the Lake St. Croix Villas Homeowners Association qualifies for an exemption from the Fair Housing Act and that the Association fulfilled the three HOPA requirements known as the:

a. 80 Percent Test

b. Intent Test and

c. Compliance Test

to obtain the HOPA Exemption from the Fair Housing Act. The Trial Court held that the Association fulfilled the Three HOPA Criteria.

CITATIONS OF OPINIONS AND ORDERS BY COURTS

1. Trial Court Declaratory Judgment at Appendix A-1 with Memorandum of Law Judgment and Order dated April 30, 2004 at Appendix A-3. File No. C0-03-3415, Hon. Mary E. Carlson
2. Opinion of Minnesota Court of Appeals at Appendix A-34. File No. A04-1191 dated March 15, 2005 affirming lower court, Klaphake J.
3. Order Minnesota Supreme Court at Appendix A-44. File No. A04-1191 Alan Page, J dated May 22, 2005.

JURISDICTIONAL STATEMENT

1. The order of the Minnesota Supreme Court denying Petitioners petition for review was filed on May 17, 2005.
2. The United States Supreme Court has federal jurisdiction in this matter pursuant to 28 U.S.C. Section 1257.

STATUTES AT ISSUE

1. 42 U.S.C. Section 3607(b)(2)(C)(i),(ii), and (iii) (1994) provides:

> As used in this section, "housing for older persons" means housing (c) intended and operated for occupancy by at least one person 55 years of age or older per unit. In determining whether housing qualifies as housing for older persons under this subsection, the Secretary shall develop regulations which require at least the following factors:
>
> i. The existence of significant facilities and services specifically designated to meet the physical or social needs of older persons or if the provision of such facilities and services is not practicable, that such housing is necessary to provide important housing opportunities for older persons; and
>
> ii. that at least 80 percent of the units are occupied by at least one person 55 years of age or older per unit; and
>
> iii. the publication of and adherence to policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons 55 years of age or older.

2. 42 U.S.C. Section 3607(b)(2)(C)(i),(ii), and (iii) as amended in 1995 provides that housing for older persons means housing:

> intended for occupancy by persons 55 years of age or older and
>
> i. at least 80 percent of the occupied units are occupied by at least one person who is 55 years of age or older,
>
> ii. the housing facility or community publishes and adheres to policies and procedures that demonstrate the intent required under this subparagraph; and
>
> iii. the housing facility or community complies with rules issued by the Secretary for verification of occupancy, which shall
>
> I. provide for verification by reliable surveys and affidavits; and
>
> II. include examples of the types of policies and procedures relevant to a determination of compliance with the requirement of Clause (ii). Such surveys and affidavits shall be admissible in administrative and judicial proceedings for the purposes of such verification.

STATEMENTS OF MATERIAL FACTS

On June 3, 1994 Appellant M.A. Fearing, Inc. whose President is Marlene Fearing, entered into a Developer's Agreement with the City of Lake St. Croix Beach ("Developer's Agreement"). On that same date, M.A. Fearing, Inc. executed a Declaration of Covenants and Conditions and Restrictions for Lake St. Croix Villas Homeowner's Association (Restrictive Covenants). The City

of Lake St. Croix Beach required M.A. Fearing to enter into the Developer's Agreement and execute the Restrictive Covenants before approving M.A. Fearing, Inc's development for 19 residential lots, which constitute the Lake St. Croix Villas Homeowner's Association (Association). The Appellants and their attorneys maintain that the Developer's Agreement and Restrictive Covenants violate the Fair Housing Act.

The Developer's Agreement at paragraph 4.I provides in relevant part:

> Building Permits. The Developer has secured permission from the City to construct three single family residences and eight side-by-side (common wall) duplex like structures. These structures have been designed and constructed to by marketed to seniors (persons of 55 years of age or greater) with the expressed purpose of providing a market for housing needs to the elderly and senior members of Lake St. Croix Beach Community. All of these dwelling units are to be occupied by no more than two adults each except as provided in accordance with the Homeowner's Association Bylaws...

In 1995, M.A. Fearing built a dwelling on Lot 19 for Appellant Marlene Fearing who was age 53 in 1995. Lot 19 is presently unoccupied.

In 1995, M.A. Fearing, Inc. built a dwelling on Lot 18 which was sold to Theodore Perlinger, who was over 55 years of age.

On October 27, 1995, M.A. Fearing, Inc. sold a dwelling which it built on Lot 16 to Respondent Mary Parr and her late husband Robert who were both over 55 years of age.

In March 1996, M.A. Fearing, Inc. sold a dwelling which it built on Lot 14 to Karen Sylte, who was under age 55.

On June 10, 1997, M.A. Fearing Companies Inc. filed a Voluntary Chapter 11 Bankruptcy Petition which soon thereafter was converted to a Chapter 7 Bankruptcy.

On December 26, 1997, the Bankruptcy Trustee sold M.A. Fearing Companies Inc.'s remaining undeveloped lots to Appellant Progressive Real Estate, Inc.

On April 29, 1998, Progressive Real Estate, Inc. sold a dwelling which it built on Lot 4 to Robert and Arlene Swenson who were over 55 years of age.

On April 19, 1999 Progressive Real Estate Inc sold a dwelling which it built on Lot 17 to Edith Ryan who was over 55 years of age.

On May 19, 1999, Progressive sold a dwelling which it built on Lot 5 to Diana Winters who was 48 years old.

In June 2001, Progressive Real Estate Inc. sold the remaining 11 undeveloped lots to Transaction Real Estate.

On June 5, 2002, Ms. Marsha Battles-Jenks, Deputy Commissioner of the Minnesota Department of Human Rights ("MN DHR") made inter alia the following factual findings and conclusions about the Association incident to a gender based discrimination case Fearing commenced entitled, In Re Marlene Fearing v. the City of Lake St. Croix Beach. Case numbers 33859 and 37909:

> 2.v. On March 19, 2001, the male developer [Transaction Real Estate] and his associate appeared before Respondent's city council. The associate explained that they had purchased the property [Progressive Real Estate, Inc.'s 11 lots]

and that they intended to change the association bylaws to comply with the Fair Housing Act.

4.e. They [Transaction Real Estate] not only announced their intention to remove the age and occupancy limits from the bylaws, the male developer agreed to ensure that all condominium documents complied with the Fair Housing Act.

Given the MNDHR's recognition and approval of Transaction Real Estate's promise that it would remove age and occupancy restrictions from the Association's bylaws and would otherwise comply with the FHA, the Appellant's belief that the Developer's Agreement and the Association bylaws and covenants that the City of Lake St. Croix Beach imposed on M.A. Fearing Inc. were in violation of the Fair Housing Act was confirmed. Transaction Real Estate did not cause the age and occupancy restrictions to be removed from the Association bylaws.

Subsequent to May 2001, Transaction Real Estate or its affiliates sold the following lots in Lake St. Croix Beach subdivisions:

Lot 6 – Completed in July 2002 and sold to Marco Ironi. Occupied by Jimmy Hanhe, age 28, since June 1, 2003.

Lot 7 – Completed in July 2002 and sold to Marco Ironi who sold on June 13, 2003 to Larry Hall, who was 53 and had occupied the premises since October 2002.

Lot 8 – Completed February 2003 and sold to Arthur and Heather Schwin, who sold it to Anthony Thooft, who is now the President of the Association but is considerably under the age of 55. The Association consented to his purchase.

Lot 9 – Completed February 2003 and sold to Brian and Terry Williams and occupied by Paul Haugh

Lot 10 – Completed October 2002 and sold to Clint Hetschler and sold to occupants Karen and Michael Hatle (age 31) on October 15, 2003.

Lot 11 – Completed October 2002 and sold to Clint Hetschler (age 40) and currently unoccupied

Lot 12 – currently unoccupied

Lot 13 – Completed July 2002 and occupied by Marlene Fearing

Lots 1, 2, 3 – owned by Progressive Real Estate and unoccupied.

The purpose of this litany is to demonstrate that the 80% threshold was never met, a fact acknowledged by the trial court.

On May 28, 2003, the Respondents brought a declaratory judgment Action supposedly on behalf of the Association, predicated on the Developer's Agreement, Restrictive Covenants, and Association bylaws to restrict the Association occupancy to those who are under 55 years of age or older. The Respondents did not claim to be victims of any discriminatory act. To the contrary, the Respondents seek to discriminate against those residing in the Association who are under 55 years of age.

The question then becomes that of when, if ever, the Appellants were discriminated against by the Association. The Association never attempted to restrict the Appellants from selling any of the lots they owned to a party under 55 years of age. In June 2001, Appellant Progressive Real Estate Inc. sold its remaining 11 lots to Transaction Real Estate. After June 2001, Transaction Real Estate sold 8 lots in the Association. Transaction Real Estate sold lots to purchasers under the age of 55 who in turn resold to purchasers under the age of 55. From June 3, 1994 until May 23, 2003, the Association stood idly by and did not enforce the restrictions